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Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CenturyLink Petition for Declaratory Ruling, WC Docket No. 10-90, CC Docket No. 01-92; Access Arbitrage, WC Docket 18-155; 8YY Access Charge Reform, 18-156.

Dear Ms. Dortch:

I met November 26 with Arielle Roth and Kagen Despain of Commissioner O'Rielly's office and urged the Commission to deny CenturyLink's Petition[1] and reaffirm that a LEC cannot assess tariffed end-office switching charges on over-the-top VoIP traffic it routes over the public Internet. I also urged the Commission to reaffirm its unbroken line of cases holding that a carrier-customer cannot violate the Communications Act by disputing and refusing to pay charges it contends were billed in violation of a tariff.

A. A LEC Cannot Assess Tariffed End-Office Switching Charges on Over-the-Top VoIP Traffic It Routes Over the Public Internet.

The Commission's two pending intercarrier-compensation rulemakings are ripe for decision. Verizon generally supports both of the Commission's proposals,[2] which represent incremental but important steps towards "bill-and-keep as the default methodology for all intercarrier compensation traffic."[3] But without waiting for orders in those proceedings, the Commission can and should deny CenturyLink's Petition immediately.

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[1] *CenturyLink Inc., Petition for a Declaratory Ruling,* WC Docket No. 10-90, CC Docket No. 01-92 (May 11, 2018) ("*Petition*").

[2] *See* Comments of Verizon, WC Docket No. 18-155 (July 20, 2018); Reply Comments of Verizon, WC Docket No. 18-155 (August 3, 2018) (supporting a modified version of the Commission's proposal as an interim step to bill-and-keep); Comments of Verizon, WC Docket No. 18-156 (Sept. 4, 2018) (supporting an accelerated transition to bill-and-keep for 8YY traffic).

[3] *See*, *e.g.*, *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663, ¶ 736 (2011) ("*Transformation Order*"). The Commission in

As Commissioner O'Rielly wrote in his dissent to the 2015 *VoIP Declaratory Ruling*,[4] it has been well-settled "that carriers do not owe end office switching charges to other providers that do not actually perform the functional equivalent of end office switching (connecting trunks to loops)."[5] "The defining feature of end office switching," he wrote, "is the actual connection of subscriber lines and trunks."[6] And Commissioner O'Rielly concluded that "intermediate routing, such as merely placing calls onto the public Internet, does not count."[7] His dissent is consistent with then-Commissioner Pai's dissent, in which he wrote "the interconnection of calls with last-mile facilities" constitutes the "IP equivalent of end office switching."[8] "A VoIP provider that interconnects a call with a customer's last-mile facility performs the function of end office switching," he determined, "*whereas a VoIP provider that transmits calls to an unaffiliated ISP for routing over the Internet does not*."[9]

"Intermediate routing"—or "transmitting calls to unaffiliated ISPs for routing over the Internet"—is exactly what companies like Teliax and O1 do. Teliax purchases 8YY calls so it can exploit arbitrage opportunities. Teliax does not connect lines and trunks. Instead, Teliax has an Internet router that receives the 8YY calls it purchases in IP packets over the Internet[10] and sends them on in IP packets over the Internet to another LEC that converts them to TDM for delivery to the long-distance carrier — services for which that LEC bills its own tariffed switched access charges. Similarly, O1 has admitted all of its traffic comes from over-the-top VoIP providers.[11] But these carriers claim the right to charge end office switched access rates for inserting their IP routers in the flow of IP voice packets across the Internet.[12] These companies do not perform end-office switched access on these over-the-top VoIP calls, and they incur none of the actual costs that end-office switching rates were intended to cover.

2011 "launch[ed] long-term intercarrier compensation reform by adopting bill-and-keep as the ultimate uniform, national methodology for all telecommunications traffic exchanged with a LEC." *Id.* ¶ 650.

[4] *Connect America Fund*, Declaratory Ruling, 30 FCC Rcd 1587 (2015) ("*VoIP Declaratory Ruling*").

[5] *Id*. at O'Rielly Dissent.

[6] *Id.*

[7] *Id.*

[8] *Id*. at Pai Dissent.

[9] *Id*. (emphasis added).

[10] Excerpt of Deposition of Teliax President David Aldworth at 45:24-46:17, *Teliax, Inc. v. AT&T Corp.*, No. 1:15-cv-01472, Doc. 68-1 (D. Colo. Oct. 21, 2016), https://bit.ly/2sOWzAx (agreeing that "8YY traffic from Teliax's wholesale customers comes into Teliax's network in IP format . . . over the public Internet") ("Teliax Deposition").

[11] *O1 Commc'ns, Inc. v. AT&T Corp.*, No. 3:16-cv-01452 (N.D. Cal.) ("*O1 v. AT&T*").

[12] Teliax Deposition at 54:2-4 (agreeing that traffic is "sent to the tandem provider in IP format"); *id.* at 56:21-23, 58:10-14 (stating that traffic goes to HyperCube, a tandem provider, over the public Internet).

In the two years since the DC Circuit vacated and remanded the 2015 *VoIP Declaratory Ruling*,[13] disputes related to over-the-top VoIP traffic have proliferated, generating litigation in the courts, at state regulatory commissions, and at this Commission.[14] And because originating switched access rates remain relatively high, over-the-top VoIP traffic to 8YY numbers is fueling growth in the very arbitrage the Commission is trying to eliminate. The availability of high originating rates creates substantial incentives for carriers to "artificially inflate access charges billed to the interexchange carriers (IXCs) that provide 8YY services" and for them fraudulently to "flood 8YY numbers with robocalls."[15] Core Communications, for example, has asserted that "a *purchase* of X number of [originating switched access] minutes for $100,000 … generates multiples of the $100,000 in [originating switched access charge] revenues."[16]

The Commission has a longstanding prohibition against LECs collecting access charges for functions they do not provide. And when the Commission created the "VoIP Symmetry Rule"—a limited exception to this principle—in the *Transformation Order*, it still prohibited LECs from charging for functions that neither the LEC nor its VoIP partner provided. Just months earlier, the Commission had observed that, "[i]f this exchange of packets over the Internet is a 'virtual loop,' then so too is the entire public switched telephone network—and the term 'loop' has lost all meaning."[17] And when the D.C. Circuit vacated and remanded the *VoIP Declaratory Ruling*, it found the Commission's treatment of functional equivalence "muddled" and noted that Commission precedent "appear[s] to identify end-office switching as supplying actual or physical interconnection."

It's past time for the Commission to act on the remand. It should take the wind out of the sails of so many robocall-driven 8YY arbitrage schemes by reaffirming that, because actual or physical interconnection is a critical component of end-office switching, a LEC cannot charge tariffed end-office switching when it routes traffic over the public Internet in conjunction with an over-the-top VoIP provider.

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[13] *AT&T Corp. v. FCC*, 841 F. 3d 1047 (D.C. Cir. 2016).

[14] *See*, *e.g.*, *Peerless Network, Inc. v. MCI Communications Servs., Inc.*, No. 1:14-cv-07417 (N.D. Ill.) (primary jurisdiction referral to the Commission); *Peerless Network, Inc. v. AT&T Corp.*, No. 1:15-cv-00870 (S.D.N.Y); *Teliax, Inc. v. AT&T Corp.*, No. 1:15-cv-01472 (D. Colo.) (primary jurisdiction referral to the Commission); *Teliax, Inc. v. Verizon Servs. Corp.*, No. 1:18-cv-01266 (D. Colo.); *O1 v. AT&T*; *O1 Communications, Inc. v. MCI Communications Servs., Inc.*, Cal. PUC Case 17-12-014; *O1 Communications, Inc. v. MCI Communications Servs., Inc.*, No. 2:17-cv-01950 (E.D. Cal.).

[15] *8YY Access Charge Reform*, Further Notice of Proposed Rulemaking, WC Docket No. 18-156, FCC 18-76, ¶ 1 (June 8, 2018).

[16] Debtor's Post-Hearing Mem. at 9, *In re CoreTel Virginia, LLC*, No. 15-16717, Doc. 238 (Bankr. D. Md. June 6, 2018) (emphasis added), https://bit.ly/2xRaFam.

[17] *See AT&T Corp. v. YMax Communications Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 5742, ¶ 44 (2011) ("*AT&T v. YMax*").

B. A Carrier-Customer Cannot Violate the Communications Act By Disputing and Refusing to Pay Charges It Contends Were Billed in Violation of a Tariff.

The same companies running over-the-top VoIP arbitrage schemes are also asking the Commission to turn 180 degrees away from its unbroken line of cases holding that a carrier-customer cannot violate the Communications Act by disputing and refusing to pay charges it contends were billed in violation of a tariff. Teliax, O1, and Peerless all have asked the Commission to endorse two recent federal court decisions that are inconsistent with the Commission's decades of precedent.[18] The Commission should take up their invitation to address those cases and should explain those courts got it wrong.

Only a common carrier can violate the provisions of the Communications Act governing switched access charges.[19] And a company "shall be treated as a common carrier … only to the extent that it is engaged in providing telecommunications services."[20] Consistent with the Act, the Commission has held that, when a carrier-customer purchases tariffed services from another carrier, the carrier-customer is acting "in its role as a customer"—and *not* as a carrier.[21] This is why, in an unbroken line of precedent dating back to 1989, the "Commission has never held that a failure to pay tariffed charges violates the Act itself."[22]

So when the *CenturyTel* court found that Sprint violated section 201(b) of the Act by withholding payment for tariffed services because it disputed CenturyTel's right to bill those charges under its tariffs, the court misstated and misinterpreted Commission precedent.[23] That court also did not address 47 U.S.C. § 153(51) or the Commission's holding that a long-distance carrier purchasing tariffed services acts "in its role as a customer" and, therefore, cannot violate the Act.

The *Peerless* court, meanwhile, went beyond *CenturyTel* and suggested the filed-rate doctrine means a customer has no right to dispute and withhold currently billed amounts where it claims that a carrier has violated its tariff.[24] There is no support for that position. As a threshold matter, tariffs normally allow customers to withhold disputed amounts in exactly that situation,[25]

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[18] *CenturyTel of Chatham, LLC v. Sprint Communications Co.*, 861 F.3d 566 (5th Cir. 2017); *Peerless Network, Inc. v. MCI Communications Services, Inc.*, No. 1:14-cv-07417 (N.D. Ill. Mar. 16, 2018), 2018 WL 1378347.

[19] 47 U.S.C. §§ 201-208.

[20] *Id.* § 153(51).

[21] *All Am. Tel. Co. v. AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 723, ¶ 12 (2011) ("*All American*").

[22] *Id.* ¶ 13.

[23] *CenturyTel*, 861 F.3d at 576.

[24] *Peerless*, No. 1:14-cv-07417, Doc. 243, at 35-37; 2018 WL 1378347, at *16-17.

[25] *See AT&T v. YMax* ¶ 48 n.134 ("YMax's Tariff expressly contemplates that a customer may withhold payment of disputed charges while YMax pursues resolution."); *see also* Peerless Network, Inc., Access Service Tariff, FCC Tariff No. 4, § 3.6.3(C)(1) (authorizing customer to "withh[o]ld payment of the disputed amount pending resolution of the disputed bill"); Teliax

and the filed-rate doctrine enforces tariff provisions that authorize the disputing and withholding of tariffed charges. And while the Commission in *All American* suggested that it did not endorse "withholding . . . *outside* the context of any applicable tariffed dispute resolution provisions," it never has suggested that even such withholding violates the Communications Act.[26]

Whether in response to the Petition or in one of the pending rulemakings, the Commission should promptly reaffirm its longstanding precedent and explain that the *CenturyTel* and *Peerless* courts erred.

Very truly yours,

Copies: Arielle Roth
Kagen Despain

Colorado, LLC, Interstate Access Service, Tariff FCC No. 1, § 2.10.1 (similar); O1 Communications, Access Services Tariff, FCC Tariff No. 4, § 2.10.4 (similar).

[26] *All American* ¶ 13 (emphasis added).